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No. 97-300

# IN THE
# SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1997

TERRY L. STEWART, DIRECTOR, ARIZONA DEPARTMENT OF CORRECTIONS, and GRANT WOODS, ARIZONA ATTORNEY GENERAL,

PETITIONERS,

-VS-

RAMON MARTINEZ-VILLAREAL,

RESPONDENT.

**COMBINED ALTERNATIVE PETITION FOR STATUTORY WRIT OF CERTIORARI OR FOR EXTRAORDINARY WRIT (MANDAMUS, PROHIBITION, OR COMMON LAW WRIT OF CERTIORARI) TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT**

## REPLY TO BRIEF IN OPPOSITION TO COMBINED ALTERNATIVE PETITION

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## REASONS WHY A WRIT SHOULD ISSUE

### I

### THERE ARE SATISFACTORY JURISDICTIONAL BASES ENABLING THE COURT TO REVIEW THIS CASE.

Contrary to the jurisdictional objections posed by the Brief in Opposition (hereafter "BOP"), the Court's basis for review is solid.

A. CERTIORARI JURISDICTION (BOP AT VII–IX).

Petitioners assert that 28 U.S.C. § 2244(b)(3)(E) does not preclude certiorari review in this case because the Ninth Circuit explicitly concluded that Respondent's claim "is not subject to the restrictions imposed by § 2244(b)," and dismissed his motion for authorization of a successive petition as "unnecessary." *Martinez-Villareal v. Stewart*, 118 F.3d 628, 634 (9th Cir. 1997). Respondent wholly misses the point by treating this as an argument about the semantics of "dismissed" as opposed to "denied." What is critical is what the court of appeals *did*, not how it expressed itself. That court neither granted nor denied authorization for a successive petition (so it made no "authorization decision," as Respondent refers to it), but held that Respondent's petition should not be considered "successive" at all (that being the factor which triggers all of "the restrictions imposed by § 2244(b)"). Respondent cannot have it both ways; if he wishes to benefit from the Ninth Circuit's conclusion that his is not a successive petition, he must equally accept that the restrictions on review apply only to *successive* habeas applications.[1]

Moreover, certiorari jurisdiction exists even if what the Ninth Circuit did is regarded as an "authorization decision," because the opinion does not merely adjudicate Respondent's individual

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1. That certiorari was not *sought* in other cases obviously does not show that the respondents in those cases "knew no jurisdiction existed." (BOP at viii.) There being no record of the reasons for not seeking certiorari, no conclusions can be drawn.

application. Instead, it set up in pseudo-legislative fashion procedures which the court demands to be followed by *every* applicant presenting a claim of incompetency for execution. 118 F.3d at 634. Because the court of appeals opinion was based on the claimed compulsion of constitutional violations occurring whenever the statute is applied as written to such claims, it plainly is the constitutionality of the statute as a whole, and not just the "non-authorization authorization" of Respondent's "non-successive successive" petition, which is in issue here. As discussed in the Petition at 22–24, this Court has repeatedly held that it possesses authority to review the general validity of statutory schemes even when there are prohibitions against review of individual determinations made pursuant to those statutes. *See, e.g., Johnson v. Robinson*, 415 U.S. 361 (1974), and *McNary v. Haitian Refugee Center, Inc.*, 498 U.S. 479 (1991). "Congress' discretion is not unlimited, however, and the courts retain the power, as they have since *Marbury v. Madison*, to determine if Congress has exceeded its authority under the Constitution." *City of Boerne v. Flores*, ___ U.S. ___, 117 S. Ct. 2157, 2172 (1997). Therefore, this Court clearly possesses jurisdiction by means of statutory certiorari, 28 U.S. C. § 1254(1), to review this case.[2]

B. JURISDICTION BY EXTRAORDINARY WRIT (BOP AT IX–XII).

As previously shown, this Court does possess jurisdiction to review this case by means of "statutory" certiorari. Hence, it should not be necessary for the Court to deal with the complexities

2. Respondent's attempt to distinguish *Johnson v. Robison* and *McNary v. Haitian Refugee Center* (BOP at ix n.1) is unpersuasive. First, the ultimate question is whether a statute which purports to preclude judicial review of individual "benefit" determinations also forecloses judicial consideration of the constitutionality of the statutory scheme as it relates to a whole class of claimants, and Respondent fails to show why, in such comparable circumstances, a judicial determination of how to apply a statute should be treated differently from the agency determinations of how to apply statutes which were considered in those cases. Second, that this Court determined the facial constitutionality of this statute in *Felker v. Turpin*, ___ U.S. ___, 116 S. Ct. 2333 (1996), does not preclude review of this case. At issue now is the Ninth Circuit's ruling that the statute cannot be constitutionally applied as written to a particular class of habeas cases, and the fact that Petitioners happen to be supporting rather than denying the constitutionality of the statute is irrelevant.



of jurisdiction *via* extraordinary writs. However, assuming *arguendo* that jurisdiction by ordinary certiorari is unavailable, the Court certainly should exercise extraordinary writ jurisdiction of whichever sort it deems most appropriate to hear this case.

Section 1651(a), 28 U.S.C., as explicated by Supreme Court Rule 20, requires that, for the extraordinary writs to issue: (1) such action must be in aid of this Court's appellate jurisdiction; (2) exceptional circumstances must exist which warrant the exercise of this Court's discretionary powers; and (3) adequate relief cannot be obtained in any other form or from any other court. The Petition at 25–28 showed that all three of these considerations exist in this case. Respondent disagrees, but he is wrong.

The crux of Respondent's error is his perception that, because the "ultimate disposition" of his competency claim can eventually be reviewed by this Court by means of ordinary certiorari, the three factors are all absent and issuance of a writ is not appropriate. He misunderstands what is at stake here. Enactment of § 2244(b) conferred on Petitioners a valuable right, not to be burdened with repetitive litigation except under the circumstances specified by the statute. Regardless of whether Petitioners eventually win or lose on the merits of Respondent's specific claim, they have already "lost," in a manner incapable of being remedied by a subsequent appeal. Thus, a close analogy exists to the cases in which this Court has permitted interlocutory appeals of "collateral orders," because "the order at issue involves 'an asserted right the legal and practical value of which would be destroyed if it were not vindicated before trial'." *Lauro Lines S.R.L. v. Chasser*, 490 U.S. 495, 498–500 (1989) (listing criminal and civil cases authorizing immediate appeals because the deprivation of a right not to be subjected to trial is effectively unreviewable after trial and final judgment).

It therefore is clear that all of the factors necessary for the issuance of an extraordinary writ *do* exist here. Adequate relief cannot be obtained from any other court because only this Court can remedy the Ninth Circuit's action. Adequate relief cannot be obtained in any other form, and the action would indeed be in aid of this Court's appellate jurisdiction, because this is the only possible mode of redress for the deprivation of Petitioners' right not

to have to litigate a successive habeas proceeding. In short, an extraordinary writ issued now would aid the Court's appellate jurisdiction because without it there will be no appeal that this Court can meaningfully consider later.[3] The sort of "exceptional circumstances" are present which render issuance of a writ appropriate is shown by the close parallel between this case and *De Beers Consol. Mines v. United States*, 325 U.S. 212, 217 (1945), in which this Court found appropriate the issuance of an extraordinary writ. Thus, if statutory certiorari is unavailable, another writ certainly should issue.[4]

## II

## THE ISSUES IN THIS CASE WARRANT REVIEW.

Respondent offers several reasons why the Court should not grant review, none persuasive. His argument that the Court lacks jurisdiction was refuted above. His second contention, that the court of appeals' decision does not really present a Suspension Clause issue (BOP at 14), simply blinks reality. The majority of that court avoided the Suspension Clause issue only by reconstructing the Act. *Martinez-Villareal v. Stewart*, 118 F.3d at 631–34. Thus, it created a remedy for a *presumed* Suspension Clause violation. However, only the existence of an *actual* violation might have permitted the statutory manipulation in which it engaged. Moreover, the concurring judge specifically concluded that, "the 1996 Act unconstitutionally suspends the writ of habeas corpus as to competency to be executed claims," but agreed that allowing the successive petition to be heard remedied the supposed

3. Contrary to Respondent's repeated contention, it is *not* mere delay about which Petitioners are complaining, but the effective extinguishment of their right, conferred by the 1996 Act, not to have to defend against successive petitions.

4. The Court should not be deterred from issuing a writ because the Ninth Circuit judges were not served. (BOP at ix–x.) The judges were named as required by Rule 20.3(a)—Petition at ii. It is not clear on its face that Rule 20.3(b) requires such service, since the judges were not "part[ies] to the proceeding with respect to which relief is sought," the case which they decided. No materials from the Clerk's Office suggested that additional notifications were necessary. No authority is offered that, if there was an error in this regard, it is grounds for rejecting an otherwise meritorious petition.



violation. *Id.* at 635. A Suspension Clause issue *is* present in this case.

Having blithely dismissed the constitutional question, Respondent argues that the Ninth Circuit's transmutation of the statute really is nothing to be concerned about. However, the Ninth Circuit's wishful thinking, that its ruling is a narrow one, inherently limited by the nature of competency for execution claims (BOP at 14–15), has already proved incorrect. *Martinez-Villareal* has now been cited as support for permitting the filing of a successive 28 U.S.C. § 2255 motion, to litigate ineffective assistance of counsel claims under another set of "unique" circumstances. *United States v. Scott*, 1997 WL 561231 at *3 (10th Cir. Aug. 26, 1997). It thus appears that the circumstances will be deemed "unique" and the plain language of the statute disregarded whenever a successive habeas petitioner can find sympathetic judges. Such chancellor's-foot adjudication contradicts this Court's insistence that the "equitable" nature of habeas corpus does not authorize any court to ignore applicable statutes and rules. *Lonchar v. Thomas*, ___ U.S. ___, 116 S. Ct. 1293, 1298 (1996).

Moreover, even if the Ninth Circuit's holding could be cabined to "only" competency for execution claims, that would not mean that an insignificant number of cases would be affected. This Court has repeatedly noted the unique susceptibility to abuse of the claim of incompetency for execution. *See, e.g., Ford v. Wainwright*, 477 U.S. 399 (1986) (dissenting opinions of Justices O'Connor and Rehnquist); *Solesbee v. Balkcom*, 339 U.S. 9, 12–13 (1950) (discussing cases). Since such assertions are easily manufactured, and can be made up to the instant of execution, they surely will become the claim of last resort in thousands of death penalty cases, and leaving this case unreviewed will only exacerbate the problem. Since the opinion was issued, efforts have already been made to add claims of incompetency for execution in numerous Arizona capital habeas cases, including ones where no complaints of mental problems had been raised before.[5] An attempt to obtain relief based

5. The Arizona Federal Public Defender Office, where the author of

(continued...)

on *Martinez-Villareal* was recently made in a Texas capital case. *In re Davis*, 1997 WL 534153 (5th Cir. Aug. 27, 1997). Thus, its pernicious effects are already spreading, and will continue to do so unless this Court puts a stop to it.

Respondent's next ploy to disinterest the Court is to claim that no real split exists between *Martinez-Villareal* and *In re Medina*, 109 F.3d 1556 (11th Cir. 1997). This assertion flies in the face of the Ninth Circuit's own recognition that its opinion contradicts *Medina* regarding whether the Act's restrictions on successive petitions apply to "original" habeas petitions filed in this Court. See 118 F.3d at 632 and n.4. It also expressly contradicts *Medina* on whether review by certiorari is sufficient to remove any Suspension Clause problems. *Id.* at 631 and n.3. The end result of these differences was, of course, the Ninth Circuit's conclusion that it was necessary to rewrite the statute so that it would not apply to competency for execution claims, which is completely at odds with *Medina*. Moreover, the circuit split has deepened with the Fifth Circuit's decision in *In re Davis, supra*. Contrary to Respondent's assertion, *Davis* holds that a competency for execution claim can be presented (despite being successive) to this Court in an "original" habeas petition. 1997 WL 534153 at *5. *Davis* further disagrees with the Ninth Circuit by concluding that an "equitable exception" to § 2244(b)'s limitations on successive petitions cannot be devised out of whole cloth in order to permit lower federal court consideration of a competency for execution claim, and rejects the idea that there is a Suspension Clause problem. *Id.*, adopting the *Medina* reasoning. Thus, as time goes on, the inter-circuit division only widens, so that wildly inconsistent results will certainly occur in legally indistinguishable capital cases—unless this Court decides the question.

Finally, Respondent attempts to hide the deviant character of the decision in this case by asserting that numerous other courts "have reached the same conclusion as the court below under analogous

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(...continued)

Respondent's brief supervises the capital defense section, has sought to inject such claims into habeas proceedings involving, *e.g.*, Jeffery Timothy Landrigan and Richard Michael Rossi.



circumstances." (BOP at 17-20.) However, the cases cited by Respondent are *not* analogous, because they all involved habeas petitions which were dismissed without prejudice at an early stage (for lack of complete exhaustion, procedural defects, etc.), so that there had been no significant expenditure of effort by the parties or the courts. Here, by contrast, some 30 issues, other than Respondent's competency for execution, were strenuously litigated in both the district court and the court of appeals (with a detour through the Arizona courts) from 1991 to 1996, including a 2-day evidentiary hearing, two rounds of briefing, and lengthy oral argument. *Martinez-Villareal v. Lewis*, 80 F.3d 1301 (9th Cir.), *cert. denied*, 117 S. Ct. 588 (1996). For this very reason, the specially concurring judge below rejected the spurious analogy argued by Respondent and adopted by two other judges: "the earlier petition had no practical or legal effect, [so] it was appropriate to simply ignore it," but such reasoning could not, in this case, "justif[y] our ignoring several years of litigation in the federal courts." *Martinez-Villareal v. Stewart*, 118 F.3d at 635. Legal rules should not be extended beyond the circumstances giving rise to them; "*Cessante ratione legis, cessat et ipsa lex.*" *Lockhart v. Fretwell*, 506 U.S. 364, 373 (1993). Since the sort of circumstances which supposedly warranted ignoring the successiveness of the petitions in those other cases do not exist here, those decisions cannot support the ruling here, and should not dissuade the Court from granting review.[6] Thus, Respondent has not mustered a single meaningful argument against reviewing this case.

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6. Indeed, to the extent that the cases relied upon by Respondent reflect a widespread willingness by the lower courts to engage in creation of "equitable exceptions" to the plain language of the Act, which was discountenanced by *In re Medina* and *In re Davis*, it argues strongly in favor of review by this Court, to show that such activity is not permissible under *Lonchar*.

## III

## THIS COURT SHOULD NOT REWARD RESPONDENT'S MISLEADING TIRADES ABOUT PETITIONERS' CONDUCT OF THIS CASE BY DECLINING TO REVIEW IT.

It is a lamentable fact that Respondent's brief is larded with half-truths and whole errors, clearly designed to appeal to emotion by painting Petitioners as deceitful and bloodthirsty litigators who, for example, "have taken shifting and inconsistent positions in different courts in order to get a procedural advantage over this mentally retarded, mentally ill, illiterate, indigent capital defendant." (BOP at 21.) A Reply of permissible length probably would be insufficient, even if devoted entirely to the task, to fully expose the misleading statements in Respondent's brief. Therefore, only a few will be addressed, in the hope that the Court will recognize the pattern and reject Respondent's subterfuge.

1. Respondent (who, though indigent, has always been represented by counsel) had ample opportunity to develop his claim. Contrary to the BOP at 1, counsel for Respondent did not encounter "much resistance" in getting Respondent's prison medical records, just a request from Department of Corrections personnel that he comply with standard operating procedures; counsel for Petitioners assisted him in obtaining the records. The Director of DOC declined to seek a competency hearing under the pre-1993 statute (BOP at 2) because a recent evaluation by a psychiatrist and a psychologist indicated there was no reason to question Respondent's competency. Although Petitioners' counsel pointed out the availability of such a mechanism under Arizona law, Respondent's counsel declined to seek judicial involvement in the manner approved by *Phyle v. Duffy*, 334 U.S. 431 (1948). After the statute was amended to provide for virtually automatic judicial hearings, Respondent requested and received one, involving 4 days of testimony. Several of Respondent's experts did testify concerning retardation; the request for yet another one (BOP at 7) was denied because it was late, the proposed witness was on the east coast, and no showing was made that he could contribute anything helpful. The MRI was denied because Respondent's own witness



acknowledged that it would not assist the court in determining competency, and the special EEG requested was of a sort previously found by several courts not to be generally accepted within the medical profession. That Respondent received fair consideration of his competency for execution is shown by the fact that he did not even bother to raise any of the quibbles he now presents in his certiorari petition concerning the competency determination (No. 96-9068).[7]

2. Although Respondent presents it as absolute fact, it actually was heavily disputed among the experts whether (or to what degree) he is retarded, brain-damaged, or mentally ill. Judge Bilby's qualms expressed about Respondent's competency in 1997 (BOP at 10-11) were based solely on a hearing held in 1994. Testimony in the 1997 state court hearing (which Judge Bilby had not seen) revealed that Respondent had "scammed" Judge Bilby, by intentionally altering his appearance and behavior for that hearing, and then reverting to normalcy afterward. The dubiety expressed by Arizona Supreme Court Justices Zlaket and Feldman, and trial court judge Montiel (BOP at 11-12), was based on the demonstrably inaccurate remarks by Judge Bilby.

3. Petitioners have never sought to take improper advantage of Respondent. To the extent that their position did change, it was because the law unexpectedly changed, in the 1996 Act. Respondent repeatedly castigates them for contending in 1993 that his competency claim was then unripe, but never even attempts to show that that position was legally incorrect, or how the district court could properly have considered the claim at that point. The statutory amendments were enacted after the Ninth Circuit's original decision in this case, and so could not be considered in that context. Petitioners "said nothing" regarding Respondent's motion asking the district court to reconsider the judgment it issued in compliance with

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7. The Court's file in that case (Pet. App. B) also shows that Respondent has severely truncated the trial court order discussed in his current Brief at 8. He has omitted the trial court's findings that there was credible evidence that Respondent was malingering—either does not suffer at all from the various maladies claimed, or suffers from them to a lesser degree than claimed—and that he had not proved incompetency by *any* standard, not even by a mere preponderance of the evidence.

the Ninth Circuit's mandate (BOP at 5-6, 21) because Arizona District Court Rule 1.10(p) forbids responses to motions for reconsideration unless specifically ordered by the court.

This list could go on and on, but the Court surely understands what Respondent attempted to do here. The revered Arizona Congressman, Morris Udall, reportedly quipped that, "He who throws mud, loses ground." The Court should validate that observation by disregarding Respondent's shameless mishandling of the record in this case.

## CONCLUSION

Based on the foregoing authorities and arguments, Petitioners respectfully request this Court to grant the petition for writ of certiorari.

Respectfully submitted,

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